was told that she should look for a blood-donor. She could find nobody. It was suggested to her that she should buy blood. The appellant came to see her one day and said that there was blood available. The complainant asked him how much it would cost and he replied $300. She gave him $300 in three instalments. As a result the appellant approached an Indian acquaintance and requested him to give blood for one of his (the appellant's) relatives. The acquaintance did so and the blood was administered to the complainant's husband.

The learned Deputy Public Prosecutor did not contest that on these facts the complainant was in no way cheated by the appellant. She wanted a pint of blood of a group which could be administered to her husband for which she was prepared to pay $300. She paid $300 and the appellant caused it to be supplied to her husband and thereby fulfilled his part of the transaction. With the ethics of this transaction the Court is not concerned. I therefore allowed the appeal, quashed the conviction and sentence, and ordered that the sum of $300 compensation paid to the complainant by the appellant be returned by the complainant forthwith.

Appeal allowed.

PUBLIC PROSECUTOR v. LIM KWAI THEAN

[R.Cr.J. (Good J.) January 17, 1959]

[Ipoh — Criminal Revision No. 27 of 1958]

Emergency (Registration Areas) Regulations, 1948, regs. 10(1) and 20A — Identity Card — Failure to produce on demand — Onus to establish whether person is or is not required to be registered — Persons exempted from registration — Presumption — Rebuttal.

Evidence Ordinance, 1950, s.106—"Especially" — Effect of — Practicability and convenience — Consideration of, in construing s.106.

Registration Areas — Observations.

The accused was charged with failure to produce his identity card when asked for by a police officer. The facts were that when he, driving a lorry, arrived at a police road block or food check he did not stop, but one of the constables on duty there called out after him and then he stopped. The constable went up to him and asked him to produce his identity card but he failed to do so. At the trial his counsel submitted that the onus lay upon the prosecution to establish affirmatively that the accused was a person required to be registered under the Emergency (Registration Areas) Regulations and submitted that as no such proof had been given by the prosecution, there was no case for the accused to answer.

Held: (1) in the Federation of Malaya as a result of orders and declarations made under the Emergency Regulations there is a presumption that any adult is a person required to register under these Regulations;

(2) the onus lay on the accused to prove that he was not within the application of these Regulations;

(3) the effect of the word "especially" in section 106 of the Evidence Ordinance is that if it is an easy matter for the person concerned to prove a fact that the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution.

Cases referred to:—

(1) *Abdul Manap v. Public Prosecutor* [1952] M.L.J. 140, C.A.

(2) *Busu v. Public Prosecutor* [1948-49] M.L.J. Supp. 140, C.A.

(3) *Lim Ah Tong v. Public Prosecutor* [1948-49] M.L.J. Supp. 158, C.A.

CRIMINAL REVISION.

F. G. Cooke (Sr. Federal Counsel) for the prosecution.

A. S. Yeo for the accused.

Good J. delivering oral judgment: This case was submitted for revision at the instance of the learned Magistrate who tried it. The accused was charged before him in the Magistrate's Court at Kuala Kangsar with an offence under Regulation 10(1) punishable under Regulation 20A of the Emergency (Registration Areas) Regulations, 1948. The charge was —

"That you on June 17, 1958 at about 3.30 p.m. at Police Food Check at 32½ milestone Kenas Road, Kuala Kangsar, in the district of Kuala Kangsar, in the State of Perak, did fail to produce your NRIC when asked by a Police Officer in uniform in execution of his duty, and you have thereby committed an offence under Regulation 10 (1) and punishable under Regulation 20A of the Emergency (Registration Areas) Regulations, 1948."

The facts given in evidence by the prosecution were that the accused was driving a lorry, and when he arrived at a Police road block or food check he did not stop but one of the constables on duty at the road block called out after him and he then stopped. The constable went up to him and asked him to produce his identity card which he did not produce. The Regulation under which he was charged provides as follows:—

"Any police officer and any person authorised for the purpose by the Chief Police Officer may at any time require any person required to be registered under these Regulations to produce his identity card for inspection, and, if such person refuses or fails to produce such card on demand or within such time as such police officer or

authorised person may allow, he shall be guilty of an offence against these Regulations."

At the trial, Mr. Yeo, Counsel for the accused, submitted that the onus lay upon the prosecution to establish affirmatively that the accused was a person required to be registered under the Regulations and submitted that as no such proof had been given by the prosecution, there was no case for the accused to answer. The learned Magistrate accepted that submission and acquitted the accused without calling upon him for his defence; but subsequently he came to the conclusion that he had been wrong in taking the course that he did and, having come to that conclusion, he very properly of his own motion sent the case to the High Court for revision. There is only one point in these proceedings, and that is the point which was the subject-matter of Mr. Yeo's submission at the trial. The question is: Where does the onus of proof lie in order to establish that a person is, or is not, as the case may be, a person required to be registered under these Regulations? In order to discover what persons are required to be registered under these Regulations, it is necessary first to look at Regulations 3 and 4. Since all the orders and declarations under Regulations 3 and 4 were made and promulgated in the years 1948 and 1949, it will be more convenient if I read those Regulations in the form in which they stood at that time (as a result of constitutional changes that have taken place the wording has been altered though the substance remains the same). In their original form before amendments at the date of Merdeka in 1957 they read as follows:—

"3. The Mentri Besar in any State and the Resident Commissioner in any Settlement may, by order, declare any area or areas within the State or Settlement to be a registration area for the purposes of these Regulations.

4. Where an area has been declared a registration area, the Mentri Besar or Resident Commissioner, as the case may be, may, by the same or by a subsequent order, direct that all persons or any specified class of persons within that area or within any specified part thereof shall register with the police or such other authority as may be specified."

Fortunately, the editor of the Emergency Regulations has set out a list of all the relevant gazette notifications, and I have therefore been able to refer to every notification under Regulation 3 declaring registration areas, and to every notification under Regulation 4 directing what persons or classes of persons are required to register. And the nett result of my research is as follows: That the whole of the Federation consists of registration areas which have been declared by States. Every State and both Settlements — as they then were — i.e. the States of Penang and Malacca, have been declared registration areas; so that when you add up the results of 11 gazette notifications under Regulation 3 you arrive at the result that the whole of the Federation consists entirely, without any exception, of registration areas. The result of the gazette notifications under Regulation 4 is that, subject to certain exceptions to which I will refer in a moment, everybody over the age of twelve in the Federation is required to register. Some of the exceptions appear in the gazette notifications made under this Regulation. They are specialised and limited and, in fact, there are only two of them left although in the original notifications there were quite a substantial number of exceptions or exemptions, some of which were fairly extensive. As a result of a series of amendments there are only two exemptions left in the notifications themselves; and they are that in the States of Kelantan and Trengganu persons who are too old or infirm to leave their residences are excused from registering provided that they get a letter from the proper authority to that effect. The exceptions or exemptions contained in the Regulations themselves are set out in Regulation 26 and they are, first of all, persons of very high rank and position such as the Yang di-Pertuan Agong, his Deputy, Rulers, Governors, and certain Singapore dignitaries; children under the age of twelve; persons holding Singapore registration cards; members of the Forces; persons in transit; persons holding diplomatic identity cards; members of the regular Police Force; immigrant Malay harvesters in Kedah and Perlis; and aborigines in possession of identity discs. The only circumstances in which a Chinese adult who is not so old and infirm that he is unable to leave his residence could be other than a person required to register would be if he was the holder of a Singapore identity card, if he was a person in transit, or if he was a Police Officer, a member of the Forces, or a member of the diplomatic or consular corps or one of the international organisations. But in every one of those cases if he was not a person required to register under these Regulations, he would be under an obligation by virtue of these Regulations to have in his possession another document which is accepted in substitution for an identity card. In these excepted cases, he would have to be in a position to say that he

possessed — or that he would be able to produce later (if he did not actually have it on his person at the time) — a travel document if he was a transit passenger, a Singapore identity card, a military document of identity, a diplomatic or consular identity card or an international organisation identity card, or a Police Officer's warrant card. In my view, the position in the Federation is such that there is as a result of the orders and declarations made under these Regulations a presumption that any adult in the Federation is a person required to register under the Regulations. That presumption can be rebutted by the production of one of these substitute documents if the person concerned belongs to one of the excepted categories. The question is: Does the onus lie upon the prosecution to prove that any particular person who fails or refuses to produce an identity card on demand by a Police Officer is not a member of one of the excepted categories, or does the onus lie upon the person concerned to prove that he is an excepted person? In my opinion, the effect of section 106 of the Evidence Ordinance is quite clear: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," and then follows the very well-known illustration (b) — the railway ticket illustration. To interpret that section properly, I think it is essential to concentrate upon what was meant by the word "especially." It does not say "'*exclusively*,' or '*solely*,' within the knowledge of any person." And, as I see it, the effect of the word "especially" is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution; and that is, as I understand it, the *ratio decidendi* of the case in *Abdul Manap v. Public Prosecutor*.[1] That case dealt with the burden of proof of lawful authority to possess arms or ammunition under Regulation 4(1) of the Emergency Regulations.

In *Busu v. Public Prosecutor*,[2] the Court of Appeal quoted the following passage from *Lim Ah Tong v. Public Prosecutor*[3]:

> "Finally, there is one respect in which the learned Trial Judge's summing-up was rather too favourable to the appellant. He stated that the prosecution must prove that the fire-arm which was in the possession of the accused, was unlicensed and that he had no licence to possess it. We think this puts the matter too strongly. The prosecution should give *prima facie* evidence that a fire-arm in the possession of an accused is unlicensed; but if the accused in fact had a licence this is a matter as much within his own knowledge as the possession of a railway ticket would be in the circumstances described in illustration (b) to section 106 of the Evidence Enactment, and it is therefore for the accused to show, if this be the fact, that he is licensed"

but went on to hold that the words, 'The prosecution should give *prima facie* evidence that a firearm in the possession of an accused is unlicensed' should not be read as if they whittled down the effect of section 106 of the Evidence Enactment. The decision in *Busu's* case was that although the prosecution brought no *prima facie* evidence to show the appellant had no licence in respect of the firearm in his possession, no duty lay on them to do so. The appeal was accordingly dismissed. And in *Manap's* case the Court, having cited the above passage from *Lim Ah Tong's* case went on to say:

> "At the time when *Lim Ah Tong's* case was tried the emergency was only a few months old and some evidence of the absence of a licence for a fire-arm could be given by producing the register of licences in respect of the State or Settlement in which the offence took place and such evidence was usually adduced. The words 'The prosecution should give *prima facie* evidence' in the judgment in that case no doubt intended to convey no more than that the practice of adducing such evidence, when available, should be continued. In view of the continuance of the emergency and the movements of terrorists it later became useless to prove that a fire-arm was unlicensed in one particular State and it would clearly be impracticable to produce all the registers in every case. We have no doubt, therefore, that the law under the Emergency Regulations, 1948 was correctly laid down in *Busu bin Haji Teh's* case."

And the second last paragraph of the judgment says:

> "We are, therefore, of opinion that in cases of this kind under Regulation 4 of the Emergency Regulations, 1951 it is not an essential part of the case for the prosecution to prove the absence of lawful authority and that in the present case the onus of the negative averment was on the accused to prove that he had lawful authority to possess the arms and the ammunition."

I have referred to that case for the purpose of emphasising and illustrating the fact that practicability and convenience have been taken into consideration in construing section 106 of the Evidence Ordinance, and for the purpose of reinforcing my own remarks on the meaning, as I see it, of the word "especially" in that section. In effect, in a case like the present case, the question is: Had the accused any lawful authority to be going about without an identity card? And the only sort of lawful authority he could have had for doing that would have been for him to have been a member of one of

the excepted classes, and to have been in possession of something which is accepted, in respect of those classes of persons, instead of an identity card. Therefore, if he was a member of one of the excepted classes, in the light of the judgment in *Abdul Manap's* case, it seems to me perfectly clear that the onus lay on him to prove that he was not within the application of the Regulations. I therefore hold that the learned Magistrate was wrong in the view that he took at the trial, and that he ought to have called upon the accused to discharge the onus which lay upon him of proving that he was not a person required to register. I therefore order that the case be remitted to the learned Magistrate with directions to him to re-open it and to call upon the accused for his defence.

Order accordingly.

MALAYA BORNEO BUILDING SOCIETY LTD. v. M. RAMACHANDRAN

[C.A. (Thomson C.J., Smith and Ong JJ.) January 21, 1959]

[K.L. — F.M. Civil Appeal No. 42 of 1958]

Contract — Building contract — Building society holding State land as approved applicants entering into agreement with customer and expending money to build house — Customer defaulting — Relief.

The appellant building society are approved applicants of State land at Petaling Jaya and the respondent was one of their customers who, pursuant to an agreement made between them had been put in possession of a plot of the land, upon which the appellants had expended moneys to build a dwelling house. The respondent having defaulted in performing his part of the agreement by refusing either to make the stipulated monthly payments or to deliver up possession of the property to the appellants, they terminated his licence and brought this action asking for the remedies to which a foreclosing mortgagee would be entitled, asked for judgment for the whole of the capital sum payable under the agreement, for an order for possession and for an order of sale, the proceeds of sale to be applied in reduction of the capital sum due.

Held: the appellants are entitled to compensation for damage they have suffered. The measure of damages must be the actual loss. In the circumstances of the case damages at the rate of $50 per month from the date of respondent's occupation until possession is given is reasonable.

Cases referred to:—

(1) *The State of Johore v. Tan Ah Boon* [1934] M.L.J. 142.

(2) *Doe v. Baytup* 3 A. & E. 188, 192.

(3) *The Kestrel* 1 A. & E. 78.

(4) *Ministry of Agriculture v. Mathews* [1949] 2 All E.R. 724.

(5) *Haji Abdul Rahman v. Mohamed Hassan* (1915) 1 F.M.S.L.R. 290, P.C.

COURT OF APPEAL.

J. S. H. Skrine for the appellant.

R. R. Chelliah, amicus curiae.

Cur. Adv. Vult.

Thomson, C.J.: This appeal arises from an action brought by the Malaya Borneo Building Society, Ltd. (which I shall call the Society) against a Mr. Ramachandran arising from an agreement between the parties dated 8th November, 1956, relating to the occupation of a plot of land by Mr. Ramachandran in the Township of Petaling Jaya.

Apart from originally entering appearance Mr. Ramachandran has taken no part in the proceedings. As, however, the case was clearly one of difficulty and as we were informed that the questions which it raised were of some public importance we invited Mr. R. R. Chelliah to assist us as *amicus curiae* and before proceeding further I would wish to express our appreciation of the assistance we have derived from the learned and penetrating argument which Mr. Chelliah addressed to us.

Some time ago the Government decided to set up a new town on State Land at Petaling Jaya in the State of Selangor. The simplest way of doing this would have been to alienate plots of land within the area in question to persons who wished to reside or carry on business there. Such a course was, however, not considered desirable and other arrangements were made with the Local Authority which had been set up for the new town and the Building Society which is what is loosely known as a Government-sponsored organisation and is financed by the Colonial Development Fund and which is registered as a limited liability company in Singapore.

In very bare outline the nature of these arrangements was as follows. The Administrator of the new town was appointed a Collector of Land Revenue. Any prospective inhabitant approached the Building Society who thereupon applied to the Collector to be allowed to go into occupation of a plot of land in expectation of registration of title under section 17 of the Land Code. On the application being approved the Society paid the necessary premium and fees and were placed on the "Roll of Approved Applicants" under rule 7 of the Land Rules and entered into occupation. They then paid for the erection